

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JENNIFER ANNE JONES, a/k/a JENNIFER
ANNE RUTHRUFF,

Defendant-Appellant.

UNPUBLISHED

August 10, 2004

No. 246842

Calhoun Circuit Court

LC No. 02-001599-FC

Before: Murray, P.J., and Markey and O'Connell, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of three counts of first-degree criminal sexual conduct (CSC I), MCL 750.520b(1)(a), one count of CSC II, MCL 750.520c(1)(a), and three counts of gross indecency between a male and a female, MCL 750.338b. She was sentenced to concurrent terms of 225 to 420 months' imprisonment for each CSC I conviction, 84 to 180 months' imprisonment for the CSC II conviction, and 17 to 30 months' imprisonment for each gross indecency conviction. She appeals of right, and we affirm.

This case arose when defendant became a participant in her husband's sexual abuse of his adolescent adopted daughter. The victim was born on February 24, 1989. She testified that her adoptive father began engaging in fellatio and cunnilingus with her from the age of nine or ten. Before defendant married the victim's father in November 2000, he asked the victim if she would like to participate in sexual acts between him and defendant. She expressed indifference. Soon afterward, defendant and the victim's father had sexual intercourse and the father had the victim watch. Defendant knew the victim was watching, but was laughing during the incident.

The victim testified that she and her father moved into defendant's trailer after the marriage. Her father continued to sexually molest her during this period, but her father did not violently fight with defendant until after the victim began participating in the couple's sexual activities. About a month after the marriage, the victim's father began gathering the victim and defendant in his bedroom and telling the victim to perform cunnilingus on defendant. He then watched and masturbated while she complied. During these sexual sessions defendant occasionally performed cunnilingus on the victim, and, on one occasion, penetrated the victim's vagina with her finger. Defendant also frequently touched the victim's breasts. While defendant testified that she acted only at the direction of and under duress from her husband, the victim testified that defendant always engaged fully in the sexual acts and occasionally encouraged the

victim's participation. The prosecutor introduced the following evidence to demonstrate that defendant voluntarily participated in her step-daughter's molestation.

One of the victim's friends often stayed overnight with the victim, sometimes for several days in a row. Once, while the victim's father watched a pornographic video in the living room with the girls, defendant brought them some wine from the refrigerator. The girls did not like it, so defendant went to the store and brought back some wine coolers. The girls moved into a bedroom, but defendant approached them and told them "Come out here because we're going to show you how to have sex; how it's done right." The girls went back into the living room and watched as defendant and the victim's father had sexual intercourse.

On one occasion, defendant asked the children if they would like to "do some stuff" with her and her husband. When the victim refused, defendant repeatedly asked her why. When the victim stated that she did not want to participate in the sexual activities anymore and that her father always told her she could stop any time, defendant grew antagonistic and repeatedly inquired into her reasons. Defendant persisted in questioning the victim after she began crying, and eventually sent the victim to bed. While no sexual activity occurred that night, defendant, the victim, and her friend engaged in sexual activities together on numerous other occasions. Once when defendant and the victim picked up the victim's friend for an overnight stay, defendant told the girls that she and her husband had "something planned for you girls tonight," and that night all four of them engaged in group sex.

On another occasion, defendant walked into the living room where the victim and her friend were watching television and told the victim to describe the "popcorn game" for her friend. Defendant then pulled off her pants and underwear and placed a kernel of popcorn on her vagina. She asked the victim to lick it off, but she refused. Although the victim's father was present, defendant initiated the entire incident. Testimony also indicated that defendant violently argued with her husband about him having sex with the victim's friend when defendant was not there to participate.

Defendant first argues that the trial court abused its discretion when it admitted evidence of defendant's various uncharged acts offered only to prove defendant's character contrary to MRE 404(b). We disagree. We review for abuse of discretion the trial court's decision to admit evidence of other acts. *People v Crawford*, 458 Mich 376, 383; 582 NW2d 785 (1998). We note that some of the controverted evidence does not amount to evidence of "other crimes, wrongs, or acts" because one of the incidents was never introduced at trial and the other was actually a charged act. MRE 404(b)(1). The other two challenged incidents were the popcorn incident and the incident when the victim refused to comply with defendant's sexual requests.

To be admissible under MRE 404(b), other-acts evidence generally must satisfy three requirements: (1) it must be offered for a proper purpose, (2) it must be relevant, and (3) its probative value must not be substantially outweighed by its potential for unfair prejudice. *People v Starr*, 457 Mich 490, 496; 577 NW2d 673 (1998). In this case, the prosecutor introduced the challenged evidence to demonstrate that defendant often took the initiative and encouraged the illicit sexual activity. This evidence rebutted defendant's claims that she suffered

from battered woman's syndrome,¹ and that her husband had always brutally coerced her into participating in the sex acts. Therefore, the prosecutor introduced the evidence for the valid purpose of showing defendant's motivated, intentional, and voluntary participation in a general plan to perpetuate a sexual relationship with the victim. MRE 404(b)(1); McCormick, Evidence (5th ed), § 190, p 664-666. The evidence was relevant because the crimes attempted were identical to the most severe crimes charged, and the circumstances of the other acts revealed defendant's personal desire to participate in sexual acts with the victim.² *People v Sabin (After Remand)*, 463 Mich 43, 64-65; 614 NW2d 888 (2000). Further, the challenged evidence was relatively mild compared to the other evidence of pervasive abuse by defendant. Therefore, the likelihood of additional, undue prejudice was negligible compared to the probative value of demonstrating that defendant initiated and encouraged the sexual contact and was not merely complying with her husband's demands under duress. *Starr, supra*. Therefore, the trial court did not abuse its discretion when it admitted this evidence.

Defendant next argues that the trial court misinstructed the jury on the crime of gross indecency. We disagree. We review a defendant's claim of instructional error de novo. *People v Lowery*, 258 Mich App 167, 173; 673 NW2d 107 (2003). The statute that proscribes gross indecency states, "Any female person who, in public or in private, commits . . . any act of gross indecency with a male person shall be guilty of a felony . . ." MCL 750.338b. The trial court's instructions differed from the model jury instructions because they explained to the jury that defendant's sexual acts only needed to be "open and perceivable" by the minor victim, rather than requiring that they occurred in a public place. *People v Drake*, 246 Mich App 637, 642; 633 NW2d 469 (2001).

In *Drake*, this Court observed, "In order to constitute grossly indecent behavior, the acts must be overt in the sense that they are open and perceivable." The Legislature, through its somewhat vague explanation of what constitutes grossly indecent behavior, provided the judiciary with latitude to discern what conduct fits the legislative description on a case by case basis. *People v Jones*, 222 Mich App 595, 602; 563 NW2d 719 (1997). In *Jones*, we found the public act of sexual intercourse by a married couple to fall within the statute's ambit because the potential lookers-on included nonconsenting adults and children under the age of consent. *Id.* at 604. Because the court's instructions comported with the elements of the crime as described in *Drake* and *Jones*, i.e., that a sexual act occurred and the act was open and perceivable by a child under the age of consent, the court did not commit error requiring reversal. *People v Caulley*, 197 Mich App 177, 184; 494 NW2d 853 (1992).

Defendant next argues that the trial court erred when it scored defendant's offense variable ("OV") 7 at fifty points and scored her OV 10 at fifteen points. We disagree. We review for clear error the score a trial court gives to a sentencing guidelines variable. *People v*

¹ This defense alone opens the door for introduction of the evidence under MRE 404(a)(1).

² We note that the prosecutor only brought three charges of CSC I, but defense counsel did not object to the victim's testimony that she performed cunnilingus on defendant more times than she could count. The pervasive nature of defendant's criminal acts lends credence to the theory that defendant instituted a tacit plan of molestation.

Hicks, 259 Mich App 518, 522; 675 NW2d 599 (2003). “Scoring decisions for which there is any evidence in support will be upheld.” *People v Elliott*, 215 Mich App 259, 260; 544 NW2d 748 (1996). Here, the trial court did not err in scoring OV 7 at fifty points because the evidence supported its finding of sadism. MCL 777.37. The statute defines sadism as “conduct that subjects a victim to extreme or prolonged pain or humiliation and is inflicted to produce suffering or for the offender’s gratification.” *Id.*

Here, defendant exposed the young victim and her close friend to sexual activities; dunned the victim with probing, humiliating questions and coercively punished her when she displayed an emotional aversion to the deviant behavior; and perpetuated the illicit activity for years. Further, the evidence nauseatingly substantiates that defendant encouraged and fully engaged in the detestable acts for her own sexual gratification. Thus, the evidence supported the court’s finding that defendant subjected the victim to acts that generated prolonged humiliation and that defendant received gratification from those acts.

Likewise, the trial court did not err in scoring OV 10 at fifteen points because the evidence supported a finding of predatory conduct. MCL 777.40. Under the statute, the sentencing court must assign OV 10 a score of fifteen points where “predatory conduct” is involved. *Id.* The statute defines “predatory conduct” as “preoffense conduct directed at a victim for the primary purpose of victimization.” MCL 777.40(3)(a). The evidence demonstrated that when the victim refused to participate in sexual activity with her friend, defendant, and her husband, defendant yelled at the victim, humiliated her, and punished her refusal to comply. On other occasions defendant plied the victim with wine and other alcoholic beverages and primed her for sexual activity with pornographic videos. Because the prosecutor presented evidence of preoffense conduct directed at the victim for the purpose of victimization, the trial court did not err in scoring fifteen points for OV 10.

Affirmed.

/s/ Christopher M. Murray
/s/ Jane E. Markey
/s/ Peter D. O’Connell